No. 23-3246

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICKY JOHNSON, aka Rodney Knuckles,

Petitioner-Appellant,

v.

HAROLD MAY, Warden,

Respondent-Appellee.

ORDER

Before: MURPHY, Circuit Judge.

Ricky Johnson, a pro se Ohio prisoner, appeals the district court's order denying his Federal Rule of Civil Procedure 60(b) motion to reopen his habeas proceedings. He moves for a certificate of appealability (COA) and for leave to proceed in forma pauperis.

Johnson was convicted of murder in 1981 and sentenced to fifteen years to life in prison. He was eventually released on parole, but in 2012 the Ohio Adult Parole Authority revoked his parole after he committed new state offenses. In 2021, he petitioned for habeas relief under 28 U.S.C. § 2254, claiming that his due-process rights were violated in his parole-revocation proceedings. The district court denied the petition for being untimely, *Johnson v. Warden, Ross Correctional Inst.*, No. 2:21-cv-790, 2021 WL 3630517, at *1-2 (S.D. Ohio, Aug. 17, 2021), and this court dismissed his appeal for being untimely, *Johnson v. Hill*, No. 21-3952, 2022 WL 1160629, at *1 (6th Cir. Feb. 4, 2022).

Johnson then moved to reopen the judgment under Federal Rule of Civil Procedure 60(b)(6), relying on *McQuiggin v. Perkins*, 569 U.S. 383, 398-99 (2013), which allows an otherwise time-barred petitioner to seek habeas relief if new evidence establishes his actual innocence. Because Johnson had not submitted new evidence of his innocence, the district court denied the motion and declined to issue a COA. *Johnson v. Warden, Richland Corr. Inst.*,

No. 2:21-cv-790, 2023 WL 2142636, at *2 (S.D. Ohio, Feb. 21, 2023). Johnson appealed and applies for a COA from this court.

To obtain a COA, a petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The question here is "whether a reasonable jurist could conclude that the District Court abused its discretion in declining to reopen the judgment." *Buck v. Davis*, 580 U.S. 100, 123 (2017).

A litigant may seek relief from judgment under Federal Rule 60(b) for several specific reasons and, under subsection (6), for "any other reason" not otherwise specified. But Rule 60(b)(6) relief is available only in "exceptional or extraordinary circumstances where principles of equity" require it, which is rare in habeas proceedings. *Miller v. Mays*, 879 F.3d 691, 698 (6th Cir. 2018) (quoting *West v. Carpenter*, 790 F.3d 696-97 (6th Cir. 2015)).

Johnson relies on *McQuiggin* as a basis for reopening his habeas proceeding and reaching the merits of his claims. But *McQuiggin* applies only to petitioners who present new evidence showing their actual innocence, 569 U.S. at 398-99, and "actual innocence means factual innocence, not mere legal insufficiency," *Bousley v. United States*, 523 U.S. 614, 623-24 (1998). Johnson provides no new evidence of his actual innocence, so reasonable jurists would agree that he cannot reopen his proceedings.

For these reasons, the application for a COA is **DENIED,** and the motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

RICKY JOHNSON,
a/k/a Rodney Knuckles

Petitioner, : Case No. 2:21-cv-790

- vs - District Judge Edmund A. Sargus, Jr.
Magistrate Judge Michael R. Merz

WARDEN, Ross
Correctional Institution,

:

Respondent.

REPORT AND RECOMMENDATIONS

Petitioner Ricky Johnson (aka Rodney Knuckles) brought this habeas corpus action *pro se* under 28 U.S.C. § 2254 to obtain release from his confinement resulting from revocation of his parole from a fifteen years to life sentence for murder. The case is ripe for decision on the Petition (ECF No. 1), the State Court Record (ECF No. 13), the Return of Writ (ECF No. 14), and Petitioner's Reply (ECF No. 18).

In 1981 Petitioner was convicted of murder in violation of Ohio Revised Code § 2903.02 and sentenced to imprisonment for fifteen years to life (Sentencing Entry, State Court Record, ECF No. 13, Ex. 3). Paroled several times, he continued to offend and was variously punished. On October 27, 2010, he was convicted of burglary in the Common Pleas Court of Summit County in Case No. CR 10 04 1130 and sentenced to five years imprisonment. However the court suspended the sentence and placed him on two years of community control (Sentencing Entry, State Court

Record, ECF No. 13, Ex. 6). Again on July 3, 2012, Johnson was convicted in Summit County of breaking and entering and sentenced to a year in prison. *Id.* Ex. 8. This new criminal conduct violated the conditions of his community control term which was revoked. Then Adult Parole Authority ("APA") also took notice and moved to revoke Johnson's parole.

Petitioner is a member of the class of persons governed by the consent decree in *Kellogg v. Shoemaker*, 927 F.Supp. 244 (S.D. Ohio 1996). Because of that, the APA notified him of his right to a mitigation hearing under the consent decree (Notice, State Court Record, ECF No. 13, Ex. 10). Johnson executed a written waiver of his procedural rights associated with the *Kellogg* hearing. *Id.* The APA then proceeded with that hearing and, on August 13, 2012, revoked Johnson's parole, resulting in his present imprisonment. *Id.* at Ex. 11.

It is from that imprisonment that Johnson seeks release, pleading the following Ground for Relief:

> **Ground One**: The Adult Parole Authority at the Kellogg v. Shoemaker "revocation" hearing violated the minimum due process requirements described by the U.S. Supreme Court in *Morrissey v. Brewer,* 92 S.Ct. 2593, when they revoked Petitioner's parole "without" (1) written notice of the claim violations of parole, in violation of due process of law of the Fourteenth Amend. of the U.S. Constitution.

(Petition, ECF No. 3, PageID 62-63).

Respondent asserts the Petition is untimely filed and should be dismissed on that basis (Return, ECF No.14, PageID 276, *et seq.*). Respondent relies on 28 U.S.C. § 2244(d) which provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Respondent calculates the filing deadline by asserting that Johnson knew all of the factual predicates of his habeas claim the day the APA acted, August 13, 2012. Therefore the statute of limitations began to run that day and expired one year later on August 13, 2013. *Id.* at PageID 277. Johnson did not file his Petition until February 15, 2021, when he placed it in the prison mailing system.[1] Because this is more than seven years after the statute expired, Respondent asserts the Petition should be dismissed with prejudice (Return, ECF No. 14, PageID 282).

In his Reply, Johnson asserts that the Supreme Court of Ohio has jurisdiction to determine whether a prisoner is entitled to release because of an inappropriate *Kellogg* hearing (ECF No. 18,

[1] For incarcerated persons, this date of deposit counts as the filing date. *Houston v. Lack,* 487 U.S. 266 (1988); *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir. 2002).

PageID 307, citing *State v. Smith*, (2009-Ohio-1914)[Correct citation, *Johnson v. Smith*, 2009-Ohio-1914 (Ohio App. 3d Dist. Apr. 27, 2009)] . He avers that he sought relief from that court on September 9, 2020, by petition for a state writ of habeas corpus. He further asserts that because the *Kellogg* hearing in his case unconstitutionally deprived him of his liberty, it was void and, under Ohio law, can be attacked at any time without application of the doctrine of *res judicata*. *Id.*, citing *State v. Fischer*, 2010-Ohio-6238[2]. He notes that the Supreme Court of Ohio dismissed his state habeas petition on October 27, 2020, and claims he thereby exhausted his available state court remedies on that date. *Id.* at PageID 308. He asserts the federal statute of limitations is tolled until the state supreme court concludes review. *Id.*

Analysis

Johnson argues that his Petition is timely because it was filed within one year of the Ohio Supreme Court's denial of state habeas corpus relief on his claim. *Johnson v. Smith, supra*, cited by Petitioner as *State v. Smith*, holds that the existence of authority in the federal court that approved the consent decree in *Kellogg* to enforce the decree does not deprive the Ohio courts of their jurisdiction to consider in state habeas corpus whether a member of the *Kellogg* class has been unconstitutionally revoked.[3] The Magistrate Judge assumes *Johnson* is good Ohio law because Ohio Revised Code § 2725.01 provides:

> Whoever is unlawfully restrained of his liberty, or entitled to the custody of another, of which custody such person is unlawfully

[2] Also reported at 128 Ohio St.3d 92.

[3] *State v. Fischer, supra*, also relied on by Johnson, holds that failure of a trial judge to impose a mandatory period of post-release control renders the judgment void. *Fischer* has been overruled by *State v. Harper*, 160 Ohio St. 3d 480 (2020), and in any event has no application this case which had no mandatory period of post-release control.

> deprived, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment, restraint, or deprivation.

Johnson's first state habeas petition raising this challenge was dismissed for procedural irregularities, but the appellate court acknowledged jurisdiction to consider APA actions in "extraordinary circumstances." *State of Ohio, ex rel Rickey Johnson v. Turner*, Case No. 9-14-30 (Ohio App. 3d Dist. Oct. 8, 2014)(copy at State Court Record, ECF No. 13, Ex. 16), citing *State, ex rel. Jackson, v. McFaul*, 73 Ohio St. 3d 185 (1995). The Supreme Court of Ohio did not give lack of jurisdiction as a ground for dismissing Johnson's most recent state habeas corpus petition (Entry, State Court Record, ECF No. 13, Ex. 21). Therefore the Magistrate Judge assumes Petitioner's third state habeas corpus petition was a "properly filed" collateral attack on the APA revocation in the sense that the Ohio Supreme Court had jurisdiction to hear it and there is no statute of limitations that barred that filing.

Johnson's filing of his third state habeas petition does not answer Respondent's limitations defense, however, because a properly filed collateral attack only tolls the federal statute of limitations, but does not start it over again. *Payton v. Brigano*, 256 F.3d 405 (6th Cir. 2001); *Rose v. Dole*, 945 F.2d 1331, 1335 (6th Cir. 1991). The AEDPA one-year statute of limitations in this case had already expired more than seven years before Johnson file his third state habeas petition and thus there was nothing for that application to toll.

Conclusion

Johnson's Petition is barred by the statute of limitations. On that basis it should be dismissed with prejudice. Because reasonable jurists would not disagree with this conclusion, it

is also recommended that Petitioner be denied a certificate of appealability and that the Court certify to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

August 2, 2021.

s/ *Michael R. Merz*
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Because this document is being served by mail, three days are added under Fed.R.Civ.P. 6, but service is complete when the document is mailed, not when it is received. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. #

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

RICKY JOHNSON,
a/k/a Rodney Knuckles

Petitioner, : Case No. 2:21-cv-790

- vs - District Judge Edmund A. Sargus, Jr.
Magistrate Judge Michael R. Merz

WARDEN, Ross
Correctional Institution,

:

Respondent.

DECISION AND ORDER

This habeas corpus case was brought *pro se* by Petitioner Ricky Johnson (aka Rodney Knuckles) to obtain release from his imprisonment following revocation of his parole from a fifteen years to life sentence for murder. The case is before the Court on Petitioner's Objections (ECF No. 20) to the Magistrate Judge's Report and Recommendations recommending dismissal of the Petition as barred by the federal statute of limitations (Report, ECF No. 19).

Under Fed.R.Civ.P. 72(b)(3), a litigant who receives an adverse recommendation from a Magistrate Judge on a dispositive question, such as disposition on the merits of a habeas corpus petition, is entitled to *de novo* review by the assigned District Judge of every portion of the recommended decision to which he or she has made substantial objection. This Decision embodies the results of that *de novo* review.

Analysis

The State Court Record establishes that Johnson was convicted in 1981 of murder in violation of Ohio Revised Code § 2903.02 and sentenced to imprisonment for fifteen years to life (Sentencing Entry, State Court Record, ECF No. 13, Ex. 3). The parole revocation proceeding of which he complains occurred August 13, 2012. *Id.* at Ex. 11. Petitioner's sole Ground for Relief on this case claims the notice of that proceeding violated his constitutional rights as established in *Morrissey v. Brewer*, 408 U.S. 471 (1972)(Petition, ECF No. 3, PageID 62-63).

Magistrate Judge Kimberly Jolson ordered an answer to the Petition (ECF No. 2). In its Return the Parole Authority claimed the Petition was untimely filed under 28 U.S.C. § 2244(d)(ECF No. 14, PageID 276). It noted the relevant parole revocation occurred in August 2012 and Petitioner then knew all the facts necessary to claim the notice was constitutionally insufficient, but Petitioner did not file in this Court until he deposited the Petition in the prison mailing system on February 15, 2021.

Petitioner responded by noting that he had filed a petition for a state writ of habeas corpus in the Supreme Court of Ohio on September 9, 2020, the Ohio Supreme Court had dismissed his state petition on October 27, 2020, and he had filed here within one year of that date (ECF No. 18).

Accepting these facts, which are established by the State Court Record, the Magistrate Judge nonetheless recommended dismissal of the petition as time-barred, noting that a collateral state court attack on a judgment merely tolls the federal statute of limitations and does not restart it (Report, ECF No. 19, PageID 318, citing *Payton v. Brigano*, 256 F.3d 405 (6th Cir. 2001), and *Rose v. Dole,* 945 F.2d 1331, 1335 (6th Cir. 1991).

In his Objections, Petitioner asserts there is no statute of limitations for filing an Ohio habeas corpus challenging an invalid revocation proceeding (Objections, ECF No. 20, PageID 322, citing *State v. Pippen*, 2014-Ohio-4454 (Ohio App. 4th Dist. Sept. 30, 2014)(McFarland, J.); *State v. Billiter*, 134 Ohio St.3d 103 (2012), and *State v. Williams,* 148 Ohio St.3d 403 (2016)

In *Pippen*, Judge McFarland, now a judge of this Court, relied on *Billiter* for the proposition that a void Ohio judgment is not subject to *res judicata* and can be attacked at any time in the Ohio courts, either on direct appeal or collaterally. *Id.* at ¶ 11. In *Williams* the Supreme Court of Ohio held that a criminal judgment which does not merge allied offenses of similar import is void and not protected by *res judicata.* In *State v. Henderson,* 161 Ohio St. 3d 285 (2020), the court abrogated *Williams* and held that such sentences are merely voidable. These cases all deal with the doctrine of *res judicata* and not any time limit on filing an Ohio petition for writ of habeas corpus.

Ohio Revised Code § 2725.01 provides:

> Whoever is unlawfully restrained of his liberty, or entitled to the custody of another, of which custody such person is unlawfully deprived, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment, restraint, or deprivation.

On its face the statute does not provide a time limit for seeking the writ. In dismissing Petitioner's most recent state habeas petition, the Supreme Court of Ohio did not cite untimely filing as a reason. In its Return in this case, Respondent does not assert that Petitioner's most recent state habeas petition was time-barred under Ohio law. The Court therefore accepts that Petitioner's filing in the Supreme Court of Ohio was timely.

That fact, however, is not relevant to the issue before this Court because it is a federal statute of limitations which is at issue here. Up until 1996 there was no statute of limitations for petitions for the federal writ of habeas corpus. However on April 24, 1996, Congress enacted the

Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA") which provided a statute of limitations on the federal writ for the first time. As provided in 28 U.S.C. § 2244(d), that limit is one year. If a state prisoner properly files a collateral attack in state court **before** that one year expires, the federal statute is tolled so long as the state collateral attack is ending. § 2244(d)(2). But as the authority cited in the Report holds, filing a state collateral attack **after** the one year runs does not restart the federal statute.

As Petitioner correctly points out, a state prisoner must exhaust available state court remedies for his claims before coming to federal court. But the fact that a prisoner may have an available state court remedy does not extend the federal statute until after exhaustion. In other words, the exhaustion and limitations hurdles to federal habeas operate independent of each other.

Petitioner's Objections on this point rely on *Lawrence v. Florida*, 549 U.S. 327 (2007); and *Isham v. Randle*, 226 F.3d 691, 694-95 (6th Cir. 2000). Those decisions hold state convictions become final on direct review when certiorari is denied by the United States Supreme Court or when the time to file a petition for certiorari expires. Petitioner's conviction became final on direct review many years ago. His state habeas petition was a collateral attack on the judgment, not a stage in the direct review process.

Conclusion

Having conducted a de novo review of the Magistrate Judge's Report in light of Petitioner's Objections, the Court ADOPTS the Report and OVERRULES the Objections. The Clerk will therefore enter judgment dismissing the Petition with prejudice. Because reasonable jurists would not disagree with this conclusion, Petitioner is denied a certificate of appealability and the Court

certifies to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

August 17, 2021.

s/Edmund A. Sargus, Jr.
Edmund A. Sargus, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

RICKY JOHNSON,
a/k/a Rodney Knuckles,

Petitioner,

v.

Case No. 2:21-cv-790
Judge Edmund A. Sargus, Jr.
Magistrate Judge Michael R. Merz

WARDEN, RICHLAND CORRECTIONAL INSTITUTION,

Respondent.

OPINION AND ORDER

This case is before the Court on Petitioner's Motion to Reopen his case pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. (ECF No. 37). The Magistrate Judge issued a Report and Recommendation (ECF No. 38), in which he recommended that Petitioner's Motion be denied, to which Petitioner objected (ECF No. 39), and Defendant responded in opposition to the objection (ECF No. 40). For the reasons set forth below, the Court **OVERRULES** Petitioner's Objection (ECF No. 39), **ADOPTS** the Report and Recommendation (ECF No. 38), and **DISMISSES** this case.

I.

Petitioner Ricky Johnson brought this habeas corpus action *pro se* under 28 U.S.C. § 2254 to obtain release from his confinement resulting from revocation of his parole from a fifteen years to life sentence for murder. Mr. Johnson filed this case February 15, 2021, contending he was subjected to violations of his constitutional rights in the parole revocation proceedings which resulted in his continued incarceration August 13, 2012.

The Court calculated that the Antiterrorism and Effective Death Penalty Act one-year statute of limitations began to run on the date of revocation and the Petition was therefore untimely. (Report and Recommendations, ECF No. 19.) The Petition was dismissed with prejudice on that basis on August 17, 2021. (ECF No. 21.) Mr. Johnson did not effectively appeal from that decision, and it remains the binding law of the case.

Petitioner now seeks relief from that judgment on the basis of *McQuiggin v. Perkins*, 569 U.S. 383 (2013). In that case the Supreme Court held actual innocence would excuse procedural failure in bringing habeas corpus proceedings, including failure to file within the time allowed by 28 U.S.C. § 2244(d).

II.

In his Report and Recommendation, the Magistrate Judge correctly explained that Petitioner's instant Motion does not constitute a second or successive habeas petition because it presents, not a new claim relating to the parole revocation, but a claim attacking a defect in this Court's prior resolution of the claim. Specifically, Petitioner argues that the application of the statute of limitations which should have been excused under *McQuiggin*. In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the Supreme Court held that a Rule 60(b) motion presents a "claim" if it seeks to add a new ground for relief from the state conviction or attacks the federal court's previous resolution of a claim on the merits, though not if it merely attacks a defect in the federal court proceedings' integrity. Because the instant Motion is not a second or successive petition, this Court has jurisdiction to decide it.

In deciding the issue, this Court agrees with the Magistrate Judge that Petitioner's Motion is properly denied because Mr. Johnson has not shown actual innocence as required by *McQuiggin*. As correctly explained in the Report and Recommendation:

> [Petitioner's] argument doubles back on his underlying constitutional claims of lack of written notice of revocation proceedings which he asserts makes the revocation unconstitutional. But actual innocence is factual innocence, not legal innocence. To establish actual innocence, "a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327. The Supreme Court has noted that "actual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). Johnson has submitted no new evidence of actual innocence at all, evidence such as exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." *Schlup*, 513 U.S. at 324.

(Report and Recommendation at 2, ECF No. 38.)

Accordingly, because Petitioner has submitted no new evidence of actual innocence that is sufficient under the binding case law, his Motion for Relief from Judgment is **DENIED**.

III.

The Court finds that reasonable jurists would not disagree with the conclusions reached in this Opinion and Order, therefore, Petitioner is **DENIED** a certificate of appealability and that the Court certify to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

IV.

For the reasons set forth above and in the Report and Recommendation, the Court **OVERRULES** Petitioner's Objection (ECF No. 39), **ADOPTS** the Report and Recommendation (ECF No. 38), and **DISMISSES** this case. The Clerk is **DIRECTED** to **ENTER JUDGMENT** in favor of Defendant and **CLOSE** this case.

IT IS SO ORDERED.

2/21/2023
DATE

s/Edmund A. Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE